ANNUAL REPORT

for the fiscal year
ending March 31, 2004

WORKERS' ADVISERS PROGRAM

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Anne S. Clark
Chief Worker Adviser

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April 4, 2005

The Honourable Kerry Morash
Minister of Environment & Labour
5151 Terminal Road
Halifax, NS

Dear Mr. Morash:

In accordance with Section 228 of the *Workers' Compensation Act*, S.N.S. 1994-95 c.10 (as amended) (Part III), I have the honour of submitting the report of the Workers' Advisers Program for the period April 1, 2003, to March 31, 2004.

Yours truly,

Anne S. Clark
Chief Worker Adviser

ASC/wcb

106-0 5982 /

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Letter from the Chief Worker Adviser

The Workers' Advisers Program had a challenging and exciting year in 2003/2004 for many reasons.

The single occurrence that will impact on the largest number of our clients was the Supreme Court of Canada's decision in *Martin* and *Laseur*. As a result, we had to review our administrative and legal resources to establish a system responding to clients affected by the decision in an efficient, timely and meaningful way without reducing service to other clients.

We faced some unexpected administrative challenges with flooding and renovations to our Halifax offices resulting in moving the offices in March 2003 and again in September.

The chief worker adviser represented the program at several events including meetings of the Cape Breton Injured Workers Association, the Atlantic Trial Lawyers Association, Workers' Compensation Law and Practice through Lancaster House, Law Reform Commission, and the public consultation meetings of the Workplace Safety and Insurance System. The program was also represented on numerous committees and working groups.

The Workers' Advisers Program is within the responsibility of Nova Scotia Department of Environment and Labour. As such, program staff participate in the department's strategic planning. One of the goals of the department's business plan is to ensure fairness for injured workers. The program is listed as one of the core business areas to achieve this goal.

One of the priorities in the business plan is to participate in the creation of performance targets for the Workplace Safety and Insurance System and in the development of a system-wide appeals management process, in consultation with stakeholders. Progress was made on both of these tasks in 2003-04.

While the work of the program increased from the previous year, the number of formal submissions and hearings decreased. This decrease is due to all files that may be affected by the "Martin" decision having been on hold. About 500 files, or 39% of our total active files at the year end, are affected. While these files are active, formal submissions can not be made nor hearings held until the rules are in place and the appeals proceed.

Mandate and History

Injured workers in Nova Scotia receive protection through workers' compensation legislation which is similar to a no-fault insurance system. The Workers' Advisers Program is a legislated agency providing assistance, advice and representation for injured workers seeking compensation who may find themselves in an appeal process that can be expensive, time consuming and complicated.

The program was established in 1996 through changes to the *Workers' Compensation Act*, replacing the Workers' Counsellor Program. It provides these services in accordance with eligibility criteria as allowed in Part III of the *Act* and set out in the Eligibility Criteria Regulations.

Staff with the new program coordinated the transition of client files from the former workers' counsellors to the head office in Halifax and to a satellite office in Sydney which opened in May 1997. Since then, the program has maintained these two offices. It also uses other provincial government offices to provide services in other regions. Advisers travel to other regions for hearings and meetings held in the workers' home areas.

Year At-a-Glance

	2003-04	2002-03
Total Expenditures	**$1,967,319**	$1,966,573
Average Service Waiting Time	**2.1 weeks**	2.8 weeks
Resource Calls	**872**	1083
Requests for Service	**1617**	1302
Clients Served	**2348**	2067
Submissions Filed	**393+Court 6=399**	572
Hearings Attended	**289+Court 7=296**	351
New Appeals Filed	**867**	926
Files Opened	**1017**	1071
Files Closed	**1059**	850

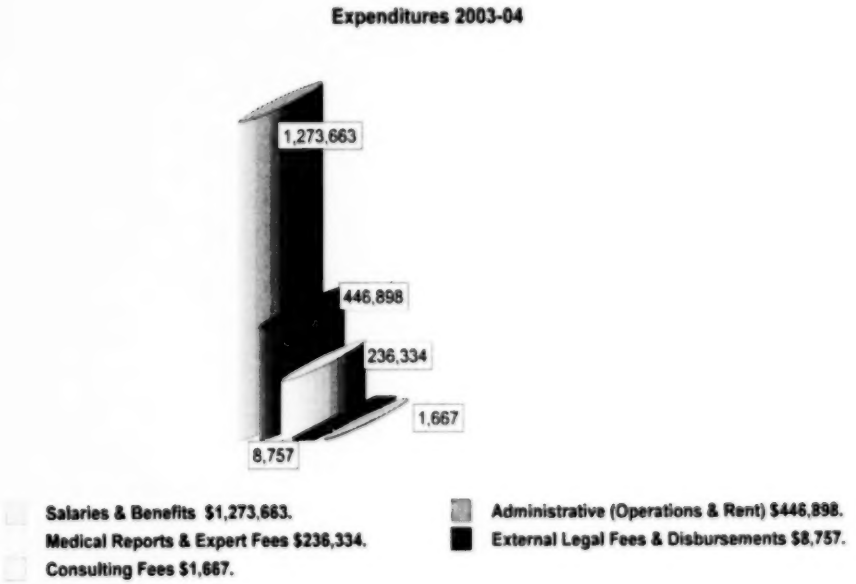
Annual Program Expenditures

Management, administration, and operation of the program remain unchanged from 2003-04. The total cost associated with the operation of the program is charged to the Accident Fund administered by the Workers' Compensation Board.

The final 2003-04 financial report provided by the Department of Finance indicates the following expenditures:

Subject	Expenditures
Salaries & Benefits	**$1,273,663.00**
Administrative (Operations & Rent)	**$446,898.00**
Medical Reports and Expert Fees	**$236,334.00**
External Legal Fees & Disbursements	**$8,757.00**
Consulting Fees	**$1,667.00**
TOTAL	**$1,967,319.00**

This represents 106% of our authority ($1,851,300.00) for 2003-04 and 102% of our revised forecast ($1,922,600.00)



Personnel

The Halifax office consists of one chief worker adviser with one secretary, one supervisor office services, one intake clerk, five advisers who are solicitors, one non-lawyer adviser, one secretary/receptionist, and two secretaries.

The Sydney office consists of one adviser who is a solicitor, two non-lawyer advisers, one secretary/receptionist, and one secretary.

Organizational Chart

Minister of Labour
Honourable Kerry Morash

Chief Worker Adviser
Anne S. Clark

Secretary to Chief Worker Adviser

Brenda Potvin

Workers' Advisers

Ken LeBlanc
Bill MacDonald
Linda Zambolin
Patricia Dunn
Jane Spurr
Bill Powroz
Denise MacDonald
Eleanor Neal
Terry Brown
Rick MacCuish

Supervisor Office Services

Wendy Buffett

Intake Clerk

Margaret Odell

Secretaries

Shannon Mugridge
Janice Harnish
Linda Peckham

Receptionist/Secretary

Vacant (Halifax)
Cathy McLean (Sydney)

(Incumbents in Place as of March 31, 2004)

Client Services

The service provided to workers under the Workers' Advisers Program can include representation through all phases of appeal in the workers' compensation system. It can begin with the first denial at the Workers' Compensation Board and end when an appeal is completed or the worker is no longer eligible for service.

Intake

An intake process exists to assess an injured worker's request for service under the eligibility regulations. The initial contact may be by telephone, letter, or in person.

First it must be determined if the worker's request is as a result of a denial from the Workers' Compensation Board. The intake clerk contacts the worker and determines if he or she meets this initial eligibility requirement. If the worker does not meet this requirement, the request for service is refused.

If the worker does meet this initial requirement, an appointment is made with an adviser. The adviser normally meets the worker to review the file and then make a decision on whether the request for service can be approved. If a worker is refused service, he or she is informed and given reasons.

An ineligible worker may request that the application be forwarded to the chief worker adviser for a final determination of eligibility. If the chief worker adviser determines the worker is not eligible for service, the worker is advised of the reasons, the process is documented and the request refused. If he or she is eligible for service, the worker becomes a client of the program.

Waiting Periods

Workers' who requested service in March 2003-04 saw a 2.7 week waiting period to see an adviser in Halifax and 1.5 week wait in Sydney. The waiting period varied throughout the year as demands required. The provincial average over the year was 2.1 weeks.

Service Waiting Times

Office	1st Quarter Average Weeks	2nd Quarter Average Weeks	3rd Quarter Average Weeks	4th Quarter Average Weeks	Year Average
Halifax	1.6	2.8	4	2.5	2.7
Sydney	1	1.6	2.1	1.4	1.5

Resource/Early Assistance

Not all workers who contact the program require legal representation. An adviser is available at all times to provide information and general assistance to callers.

Staff received 872 resource calls in 2003-04. General questions were addressed in 77% of calls. About 17% of callers required assistance with forms. Issues were resolved in 5% of calls. About 3% of callers required additional service not available under the mandate of the program.

Representation

Advisers attend hearings and meetings, obtain evidence, consult with the injured worker, and present evidence before the deciding body. Advisers also maintain a detailed client file consisting of personal information of the injured worker necessary to pursue the appropriate benefits.

Advisers work only in the area of workers' compensation law and have ready access to the research and materials necessary to successfully pursue an appeal. Advisers are attuned to issues and pressures affecting their clients and achieve an effective working relationship with them.

The program provided service in 2,348 claims or appeal files during this fiscal year and assisted in 872 resource calls. There were 1,287 active files at the end of this fiscal year.

Requests for Intake + Resource Calls*	Files Opened	Files Closed	Pending Files	Second Opinions Approved	# Clients Served to Date this Year
960 + 657 = 1617	1017	1059	0	0	2348

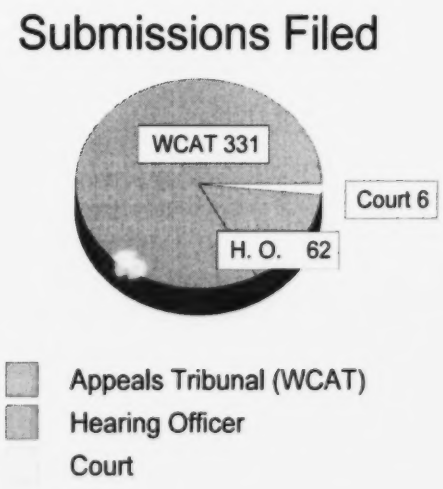
* Resource calls less those forwarded to intake for services

The Workers' Advisers Program is not mandated to represent injured workers as a special interest group or to lobby government for changes in legislation. The program does not pursue other matters peripheral to the workers' compensation claim such as Canada Pension benefits, Unemployment Insurance, or Social Assistance.

Advisers do not represent employers on matters of compensation appeals. They do not advise or represent governments or other agencies on matters of workers' compensation.

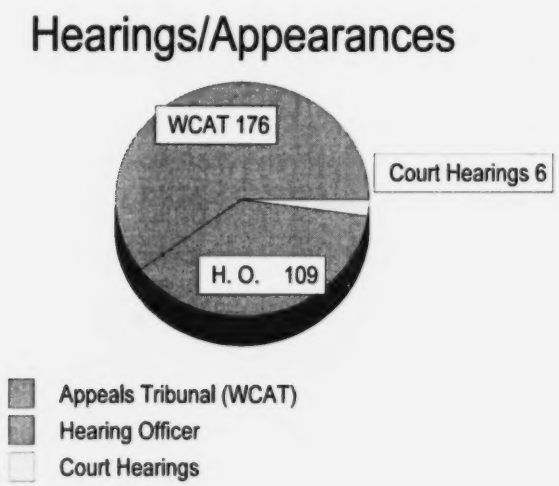
Submissions Filed

Advisers filed 399 submissions on behalf of their clients at the Workers' Compensation Appeals Tribunal, the hearing officer at internal appeals at the Workers' Compensation Board and the Nova Scotia Court of Appeal.



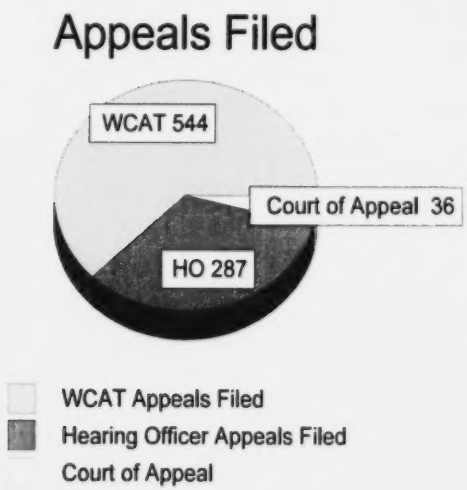
Hearings/Appearances

Advisers represented clients at 291 hearings in 2003-04 at the Workers' Compensation Appeals Tribunal, the hearing officer at internal appeals at the Workers' Compensation Board and the Court of Appeal.



Appeals Filed

There were 867 appeals filed in 2003-04 to the Workers' Compensation Appeals Tribunal, the hearing officer at internal appeals of the Workers' Compensation Board, and the Court of Appeal.



Court Statistics

In 2003-04 the program filed 313 chronic pain appeals.

Eight other appeals were filed. They included:

- six employer appeals filed to the Nova Scotia Court of Appeal;
- one worker appeal filed to the Nova Scotia Court of Appeal; and
- one employer appeal filed to the Supreme Court of Canada.

Ten appeals were completed. Of these:

- two were discontinued employer appeals;
- two were allowed – of these, one was an employer appeal and one was a Workers' Compensation Board appeal;
- three were resolved by consent – of these, two were worker appeals and one was a Workers' Compensation Board appeal;
- two were dismissed employer appeals; and
- one was a dismissed employer appeal to the Supreme Court of Canada.

Some of these appeals were filed in the previous fiscal year.

Client Satisfaction

In April, 2003, the first survey of the Workers' Advisers Program was conducted. Surveys and stamped return envelopes were mailed to clients upon the closing of their files, regardless of whether they had positive outcomes of appeals for benefits from the Workers' Compensation Board.

The program closed 1059 client files during this period. There were 232 surveys returned, representing 22% of those sent out. Fifty-two did not have positive outcomes in their pursuit for benefits. Overall results are as follows:

#1 The Program staff I dealt with were professional and friendly at all times	
Strongly Agree	**76%**
Agree	**21%**
Disagree	**1%**
Strongly Disagree	**2%**
#2 In my experience, I felt program staff had the knowledge and experience for dealing with my situation	
Strongly Agree	**74%**
Agree	**21%**
Disagree	**3%**
Strongly Disagree	**2%**
#3 I feel program staff did their very best to provide me with the best possible service	
Strongly Agree	**73%**
Agree	**20%**
Disagree	**3%**
Strongly Disagree	**3%**
#4 My calls were returned within 24 hours (On 2 surveys this question was not answered)	
All the time	**65%**
Most of the time	**26%**
Sometimes	**6%**
Never	**2%**
#5 My questions were answered to my satisfaction	
All the time	**82%**
Most of the time	**9%**
Sometimes	**4%**
Never	**3%**

Of those who responded to the survey, 166 clients took the time to make a personal comment. All but nine were complementary. Some samples include:

Thank goodness for the Workers' Advisers Program (WAP). It sure is a godsend for us workers. Thanks very much.

I thank the Workers' Adviser Program because they are there to help people that need to be helped. Great service for the people.

I would strongly recommend the workers adviser program to anyone. The expertise and knowledge the staff have was greatly appreciated. They were professional and courteous at all times and very prompt at getting things done. Thank you staff.

I am glad to see an organization which is set in place for assisting injured/taxpaying workers.

When I didn't understand the wording or a word, I would call and ask what something was and always got a clear and understanding answer. The staff I was in contact with was very understanding and friendly and explained things as it was and never gave false belief.

Bill 90/Chronic Pain Appeals

The Workers' Compensation Board appealed two decisions dealing with chronic pain released from the Workers' Compensation Appeals Tribunal. The tribunal decision found that the provisions of Bill 90 were discriminatory based on disability and refused to implement them. The court allowed the board's appeal and found that the tribunal was wrong in its determination.

The Workers' Advisers Program filed an Application for Leave to Appeal with the Supreme Court of Canada on January 5, 2001. It appealed the Nova Scotia Court of Appeal Decision issued in *Martin v. Nova Scotia (Workers' Compensation Board)* et al. on behalf of the workers. The Supreme Court applications were based on the grounds that some of the provisions dealing with chronic pain in the legislation discriminate on the basis of disability.

The Supreme Court of Canada considered two issues in *Martin*: (1) whether the Workers' Compensation Appeals Tribunal had the jurisdiction to consider the constitutionality of the challenged chronic pain provisions in s.10B of the *Workers' Compensation Act* SNS 1994-95, c.10, as am (Act) and the Functional Restoration Program Regulations; and (2) whether the challenged provisions infringed the constitution, specifically s.15(1) of the *Canadian Charter of Rights and Freedoms* and, if so, whether they were saved by s.1 thereof.

The Supreme Court of Canada ruled unanimously (9-0) in *Martin*, allowing the workers' appeals and reversing the decision of the Nova Scotia Court of Appeal.

With respect to the first issue above, the Supreme Court of Canada held that the Workers' Compensation Appeals Tribunal has express authority under the *Act* to decide questions of law arising under the *Act*. This authority includes the power to decide constitutional questions such as whether a provision of the *Act* infringes the *Charter*.

Even if it had not found express authority, the Supreme Court Canada would still have found the Workers' Compensation Appeals Tribunal has the implied authority to decide constitutional questions.

In the course of making its decision, the court revised and restated the general principles for determining when an administrative board or tribunal will have the power to decide constitutional questions. If the statute vests the board or tribunal with the express or implied jurisdiction to decide any question of law, there is a presumption that it can also decide constitutional questions unless the legislature removes this power. The presence or absence of an adjudicative process is not determinative of whether the board or tribunal in question can decide constitutional questions.

The court found that the Workers' Compensation Appeals Tribunal's implied jurisdiction clearly extends beyond the *Act* itself, to other questions of statutory interpretation or common law raised in the course of a dispute arising from the operation of the workers' compensation scheme.

With respect to the second issue above, the Supreme Court Canada found s.10B of the *Act* and the Functional Restoration Program Regulations in their entirety infringe the equality rights in s.15(1) of the *Charter* and are not saved by s.1 thereof in that the infringement was not a reasonable limit prescribed by law and demonstrably justified in a free and democratic society.

The court found the challenged chronic pain provisions failed to take into account the actual needs, capacities or circumstances of workers suffering from chronic pain in a manner that respects their value as human beings and as members of Canadian society.

The court found that despite the best available treatment, chronic pain frequently evolves into a permanent and disabling condition and, yet, under the challenged provisions workers who develop such a permanent impairment as a result of chronic pain may be left with nothing. According to the court, this could not be consistent with the purpose of the *Act* or with the essential human dignity of these workers.

The court rejected as an "indefensible assumption" that the needs of injured workers suffering from chronic pain are identical. The court was clearly troubled by the lack of personalized evaluation of the needs and circumstances of workers with chronic pain.

The challenged provisions ignored the real needs of workers who are permanently disabled by chronic pain by denying them any long-term benefits and by excluding them from the duty imposed on employers to take back and accommodate injured workers. Thus, the *Act* sent a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society.

The court recognized the challenged chronic pain provisions reinforced negative assumptions about chronic pain sufferers by sending the message that the condition is not "real", in the sense that it does not warrant individual assessment or adequate compensation. Chronic pain sufferers are thus deprived of recognition of the reality of their pain and impairment, as well as of the chance to establish their eligibility for benefits on an equal footing with others.

Under the s.1 analysis, the court stated that despite the fact that chronic pain may become sufficiently severe to produce genuine and long-lasting incapacity to work, the challenged provisions made no effort whatsoever to determine who is genuinely unable to work and who is abusing the system. According to the court, "one is tempted to say that they solve the potential problem of fraudulent claims by preemptively deeming all chronic pain claims to be fraudulent."

The Supreme Court of Canada recognized that the difficulties in establishing a causal link between a work-related injury and later development of chronic pain are adequately handled within the scope of the general compensation system in other provinces. In addition, courts faced with tort claims for chronic pain have also developed approaches that do not rely on a blanket exclusion. The court found it is impossible to conclude that the blanket exclusion was necessary to achieve a principled response to chronic pain and avoid fraudulent claims.

In order to preserve the limited benefits of the program until an appropriate legislative response to chronic pain can be implemented, the Supreme Court of Canada postponed the general declaration of invalidity for six months from the date of the judgment. Six months from this date was April 3, 2004.

Regarding Donald Martin, the Supreme Court of Canada reinstated the Workers' Compensation Appeal Tribunal's decision awarding him temporary benefits from August 6 to October 15, 1996. While not addressed in the court's decision, Mr. Martin should be able to apply to the Workers' Compensation Board for additional benefits now that the challenged chronic pain provisions will be invalid in six months.

Regarding Ruth Laseur, the Supreme Court of Canada felt it was appropriate to return her case to the board for reconsideration of her case on the basis of subsisting provisions of the *Act* and the applicable regulations and policies.

Committees and Associations

Canadian Association of Workers' Advisors/Advocates

The chief worker adviser represents the Workers' Advisers Program on this association and chairs its statistics committee. The association publishes statistical reports for its member agencies. They are available by contacting the Chair, Blake Williams or the chief worker adviser.

Tripartite Committee

The Workers' Advisers Program has no legislated obligation to the Workers' Compensation Board or the Workers' Compensation Appeals Tribunal to represent their interests or promote their processes. However, the program eases the administrative burden on those agencies by providing the board and the tribunal with a central agency for discussion of processes and issues relating to injured workers.

In an effort to promote a cohesive system, a committee was formed with representation from the senior management group of each agency to share appropriate information in areas of common interest and address administrative issues arising among the three groups. The committee meets monthly and reports to its respective agencies as necessary.

Workplace Safety and Insurance System Strategic Planning Committee

A strategic planning initiative for the Workplace Safety and Insurance System was launched in November 2002. It established broad objectives for the entire health and safety and workers' compensation program.

The chief worker adviser represents the program on the committee. It is broken into various working groups, teams and subcommittees in which other program staff contribute.

The plan makes a fundamental commitment to address three key priorities:

- prevent workplace injury and illness;
- continue consultation with stakeholders in setting the course for the future; and
- monitor the progress of this strategic plan with system performance measures.

During the past year, the strategic plan was completed, approved in August, 2003, and released to government in September.

Following adoption of the strategic plan, the program continued its work as a member of the Workplace Safety and Insurance System's coordinating committee. Details about the plan and the ongoing joint work of the system agencies are available at www.wsis.ns.ca .

Other Committees and Associations

Workers' Adviser Program staff are involved in many other committees and associations to enhance their contribution to the workers' compensation system and legal community. They include:

- Fire Warden
- Joint Occupational Health and Safety Committee
- Nova Scotia Environment and Labour Senior Management
- Nova Scotia Barristers' Society
- Canadian Bar Association
- Canadian Association of Workers' Advisors/Advocates Member
  - Statistics Subcommittee
- Association of Workers' Compensation Boards of Canada
- Workplace Safety & Insurance System
  - Coordinating Committee
  - Issues Discussion Group
  - Issues Resolution Group
  - Performance Measures Advisory Committee
- Tripartite Committee/Joint Scheduling Committee
- Workers' Compensation Appeals Tribunal & Workers' Compensation Board Training Committee

Professional Development and Training

This year, as in the past, many staff members took part in training programs to enhance their skills. All staff members are required to maintain an up-to-date first aid certificate and as always, any staff members requiring re-certification attended training.

Several advisers attended special programs on mediation, negotiation and dispute resolution provided by Henson College. Several advisers also attended government's Aboriginal Perceptions workshop, the Sources of Benefits Conference and the Survivor Benefits Conference.

The chief worker adviser and one adviser attended the Canadian Bar Association's Legislation and Law Reform Fall Forum on November 28, 2003. They also attended the Canadian Institute of Advanced Administrative Law and Practice where the "Martin" decision of the Supreme Court of Canada was addressed.

The program's intake clerk trained in file and records management. The secretary to the chief worker adviser took a specialized course in administrative assistance. Other courses attended included writing and business grammar, Excel 1 and 2, and GroupWise.

Future Developments
Looking to 2004-05

We believe 2004-05 will present the Workers' Advisers Program with a number of opportunities to improve service to our clients and effectively participate in initiatives under the system strategic plan.

We will continue to upgrade our technology where appropriate to support the work of the program and advisers. This will include enhancements to our database, developing electronic case plan files, and working with the Workers' Compensation Board to facilitate program access to our clients' electronic files at the board.

We will continue the project to create self-help packages and online services to support our resource work.

We will dedicate sufficient resources to the appeals affected by the decision in "Martin" to ensure their fair and appropriate resolution.

We will remain focused on "wait for service" and "quality of service" to ensure people who request assistance from the program continue to receive high quality service in a timely fashion.